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UNSHACKLING EXPRESSION:

A STUDY ON LAWS CRIMINALISING EXPRESSION ONLINE IN ASIA



ASSOCIATION FOR PROGRESSIVE COMMUNICATIONS (APC)

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Unshackling Expression: A study on laws criminalising expression online in Asia

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Legal limitations on online expression in Pakistan

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Introduction

The internet and freedom of expression

On 19 March 2014, the *Express Tribune*, a local affiliate of the *International Herald Tribune*, was published with five columns of blank space. The space was originally given to an article titled “What Pakistan Knew about Bin Laden”,¹ an opinion piece about Pakistan’s possible knowledge of Bin Laden’s presence in Abbotabad. In the times before the internet, the Pakistani readership would have remained unaware of what was supposed to appear in those ominously blank five columns. However, within hours of the distribution of the blank paper, Twitter was alive with links of the censored article. This incident demonstrates both the impact of the internet on freedom of expression and access to information and the mindset of states that still believe in controlling public access to information.

That freedom of expression online is a fundamental human right is now well established through multiple UN resolutions and recommendations. In 2012, the United Nations Human Rights Council (UNHRC) affirmed that “the same rights that people have offline must also be protected online.”² This affirmation means that at state levels it is important to ensure that the practice of rights online is enabled and ensured. As technology grows and the penetration of the internet widens, the benefits of technology, particularly in connection with the practice of social and political rights, have become more and more obvious.

We live in a world where the Arab Spring is globally recognised as a political revolution that was triggered and sustained through the use of social media and digital technology. As a consequence of the demonstrated potential of digital technologies to challenge political power structures, states have responded by enacting legislation that enables them to exercise increased control over the digital avenues of expression. It is thus important to document how laws and policies in different countries have come to interact with internet rights. One right that this paper is particularly concerned with is the right of freedom of expression.

Freedom of expression, a cornerstone right of any democratic society, has hugely benefited from digital technologies. Whether it is the possibility of anonymity, the connection and networking with like-minded audiences, the ease and cost of mass communication, the access to information at a global level or the potential to mobilise, the internet has enabled journalists, activists and citizens to enhance the potential impact of their expression. Consequently, states, particularly those where power status quos are existent, have responded negatively to this potential new threat to the power dynamics.

The Pakistan context

In May 2017, the Federal Ministry of Interior and then Federal Minister of Interior Ch. Nisar Ahmed issued multiple statements expressing their displeasure over the use of social media and expressing intent to initiate and strengthen a crackdown against those using social media platforms for expressing sentiment that was deemed dangerous by the ministry. On 23 May, the Interior Minister issued a statement saying that “our cultural and religious values are under attack from a section of social media.”³ The statement also included a vow to ensure

1 Gall, C. (2014, 23 March). What Pakistan Knew About Bin Laden. *The New York Times*. <https://www.nytimes.com/2014/03/23/magazine/what-pakistan-knew-about-bin-laden.html>

2 Human Rights Council. (2012). The promotion, protection and enjoyment of human rights on the Internet. A/HRC/20/L.13. ap.ohchr.org/documents/alldocs.aspx?doc_id=20280

3 The Express Tribune. (2017, 23 May). No restrictions either: No unbridled freedom on social media, says Nisar. *The Express Tribune*. <https://tribune.com.pk/story/1417195/anti-army-content-social-media-will-not-tolerated-chaudhry-nisar>

that “efforts were accelerated to track internet users’ activities online and hunt down undesirable elements.”

It is not just political power hubs like the Ministry of Interior that have advocated an increase in restrictions and monitoring of social media. In March 2017, Justice Shaukat Aziz Siddiqui of the Islamabad High Court (IHC) commented that blasphemy through social media is “a greatest form of terrorism and people involved in this heinous act are biggest terrorists,”⁴ and ordered the Ministry of Interior to “eliminate access to blasphemous content on social media, even if it means blocking all access to social media platforms.”⁵

The discussions on media, the statements from ministries and the comments from honorable judges of the judiciary appear to limit the narrative on social media to the issue of blasphemy. Yet the reality is much more complex. The statements from the Ministry of Interior followed a political disaster that unfolded on Twitter, after the official account of the Inter-Services Public Relations (ISPR) was used to send out a tweet that rejected a government statement regarding Dawn Leaks.⁶ The tweet was later withdrawn through a statement that the “Twitter post stands withdrawn and has become infructuous.”⁷ However, the original use of Twitter to reject a government statement and the following public outcry created an extremely humiliating scenario for the government, and the Ministry of Interior was at its midst.

The comments from the IHC judge followed harrowing incidents of enforced disappearances of five bloggers and activists, who were accused of being involved in running blasphemous pages, but were also known to be political activists with critical and dissenting opinions.

Ch. Nisar’s own warning about possible permanent blocking of all social media websites came right after “the refusal of the Facebook administration to share details of those persons who allegedly were running a malicious campaign against the superior judiciary through the social networking site.”⁸ The bloggers were later “recovered,” without much explanation from state authorities. However, despite any presented evidence or a court case, the bloggers were directly linked to blasphemy in the public imagination through a prolonged and structured campaign that was run online and through certain media channels.

The recounted incidents and statements occurred in the first half of 2017 alone. They remain reflective of the direction the state is taking with regard to the regulation and criminalisation of expression online. State actions connected to restriction of speech online have gone beyond mere statements, and over the last few years, Pakistan has witnessed a very structured attempt to legally restrict the space for political and other expression through the enactment of regressive laws and policies.

Methodology

This report is primarily based on a review of laws, legal cases and literature that outline legal limitations imposed upon freedom of expression online. Through a general analysis of available case law, the report also looks at how laws related to expression online have been implemented and interpreted by courts. The research framework is largely drawn from one developed by SMEX.⁹ Using this framework, the report explores sections related to online expression within the country, in the following areas:

- *Legal foundations* – including those codes that inform the legislative and legal groundwork in the country, including the constitution, the penal code and the code of procedure.
- *Fundamental rights and freedoms* – as defined within the constitution and special laws.
- *Governance of online and networked spaces* – as regulated by relevant criminal laws and within IT policies.
- *Sectoral laws* – laws that are directly related to the operations of the information and communications technology (ICT) sector.

4 Asad, M. (2017, 8 March). IHC wants blasphemous content on social media blocked. *Dawn.com*. <https://www.dawn.com/news/1319102>

5 Shehzad, R. (2017, 7 March). Blasphemy: IHC directs authorities to block all social media if necessary. *The Express Tribune*. <https://tribune.com.pk/story/1348784/ihc-directs-authorities-block-social-media-necessary>

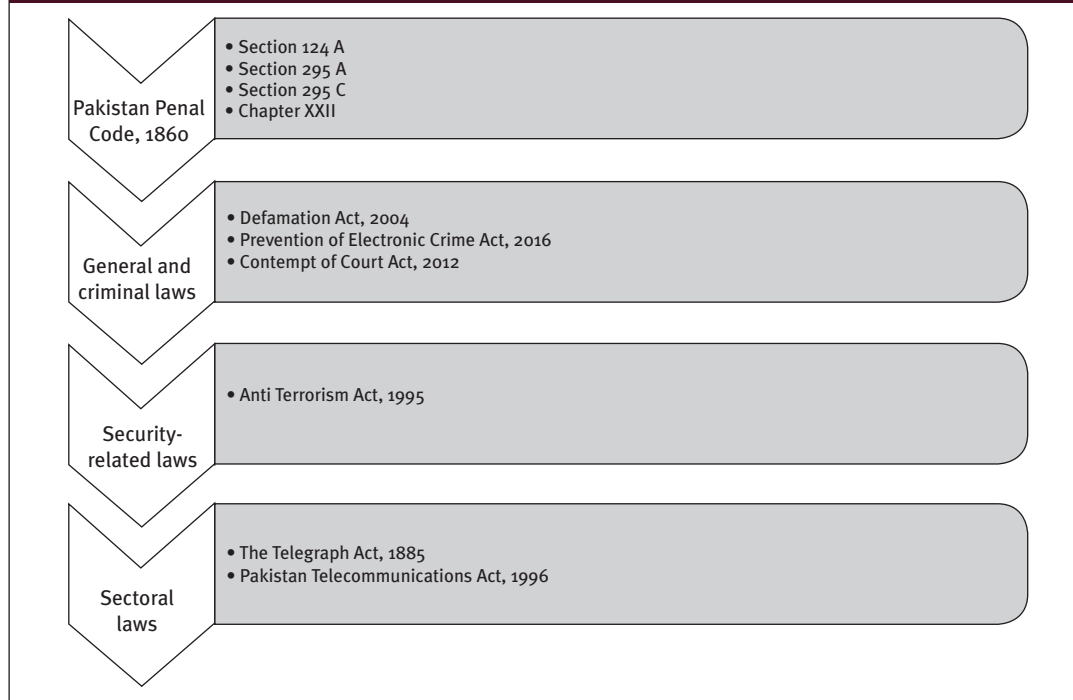
6 Dawn Leaks refers to a news story published in Pakistan’s oldest and most widely circulated English-language newspaper, Dawn. The story was based on information leaked from a high-level meeting between the civil and military leadership. The publication of the story was seen as anti-national and led to a high-level inquiry and the dismissal of then Federal Minister of Information Pervez Rasheed. See Almeida, C. (2016, 6 October). Exclusive: Act against militants or face international isolation, civilians tell military. *Dawn.com*. <https://www.dawn.com/news/1288350/exclusive-act-against-militants-or-face-international-isolation-civilians-tell-military>

7 Dawn. (2017, 10 May). Army withdraws tweet “rejecting” PM Office’s directives on Dawn story probe. *Dawn.com*. <https://www.dawn.com/news/1332244>

8 Rao, S., & Mukhtar, I. (2017, 10 March). Nisar threatens to block social media websites. *The Nation*. nation.com.pk/national/10-Mar-2017/nisar-threatens-to-block-social-media-websites

9 <https://smex.org>

FIGURE 1. Laws addressed in this report



- *Other laws* – in particular security and terrorism-related laws

The main source of case law used for this research is the Pakistan Law Site that curates different decisions of higher courts across Pakistan. Media reports on known cases have also been referred to.

Lay of the legal land

Legislative system

Pakistan has had a turbulent legislative history. In 1948, after independence from the British and partition from the Indian sub-continent, a constituent assembly was formed. The idea was to create a constitution under the Objectives Resolution,¹⁰ which held Islamic conjunctions prime. Due to the assassination of the first prime minister, Liaquat Ali Khan, the death of Mohammad Ali Jinnah and the subsequent political turmoil, the first constitution, which declared Pakistan as an Islamic Republic, could not be passed till 1956. The constitution was suspended by the first military dictator, General Yahya Khan, and was replaced by another constitution in 1962, through which the presidential system was introduced in the country. After two other periods of martial law, the parliamentary system was

eventually restored through a new constitution passed by the National Assembly in 1973. The 1973 constitution is the one in effect at the moment.

In terms of the larger legal systems and procedures, Pakistan is still operating under British Common Law. The Pakistan Penal Code (PPC) is an adapted version of the 1860 code introduced by the British in colonial India. The code therefore is colonial in nature and tends to treat citizens like subjects. An added complexity in the general legal system is the presence of a parallel system of Islamic jurisprudence. However, for the sake of this study the dual nature of the law is not relevant as the Islamic or Sharia courts have largely been used for matters related to family law.

Legislation around freedom of expression

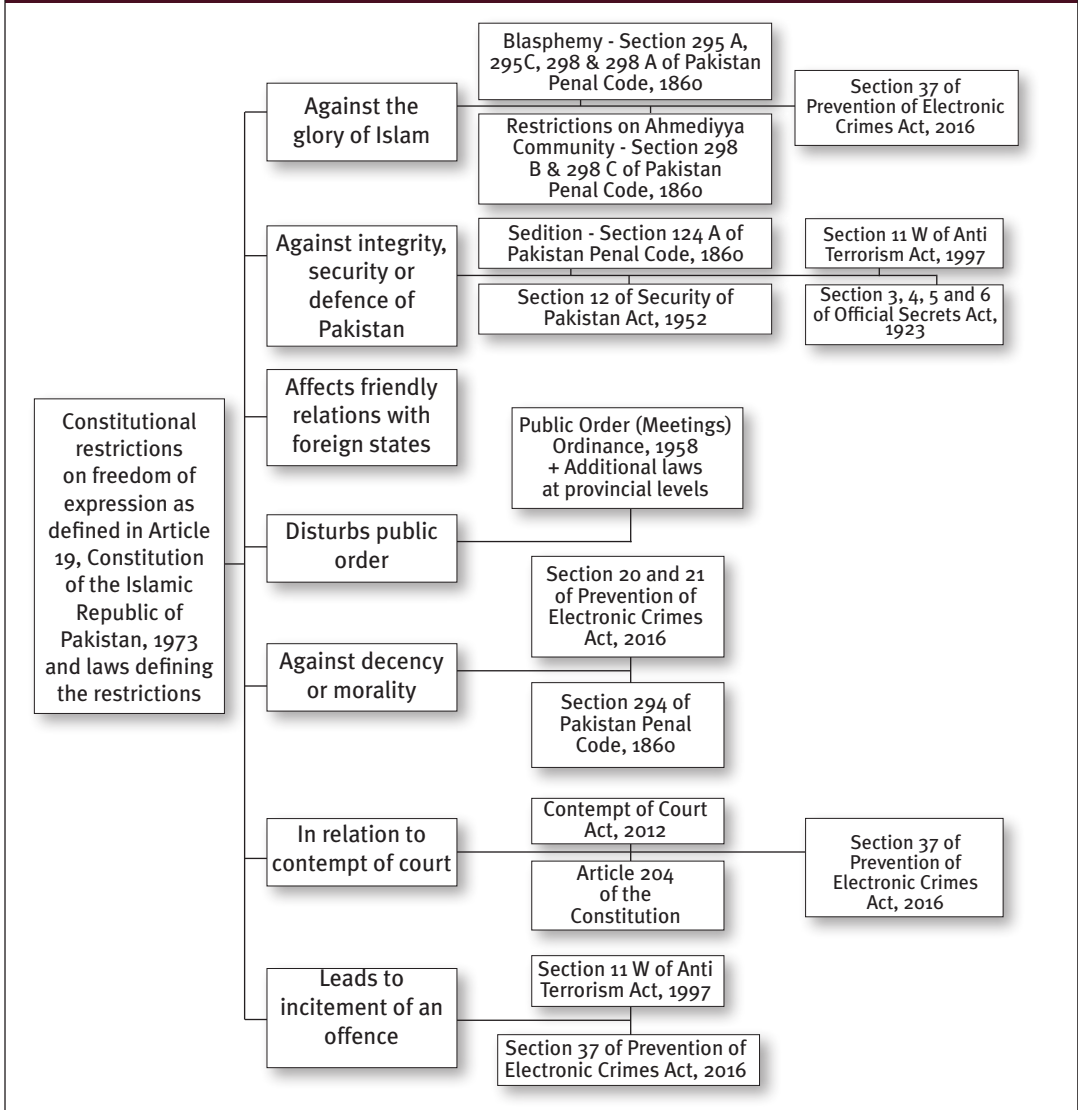
The right to freedom of expression is guaranteed through Article 19 of the constitution. The right is not absolute and the constitution allows for some restrictions that have to be prescribed by law.

In addition to laws related to restrictions there are also other laws that are used to regulate expression. For the sake of this study we will largely be looking at four kinds of laws: the penal code, criminal laws, general laws and sectoral laws (see Figure 1).

Another set of laws that are related to regulating expression are the media laws including the

¹⁰ https://en.wikipedia.org/wiki/Objectives_Resolution

FIGURE 2. Restriction on freedom of expression under Article 19 of the constitution



Pakistan Electronic Media Regulatory Authority Act, the Press Council of Pakistan Act, and other laws defining censorship and content regulation in films and advertisements. However, none of these specifically extends to the online sphere and thus they are not a subject of study in this paper.

Curtailment of online freedom of expression

Constitutionally prescribed restrictions on freedom of expression

The discussion on online freedom of expression has to start with Article 19 of the Constitution of the Islamic Republic of Pakistan, which both grants

and limits the right of freedom of expression in the country. Article 19 states that:

Every citizen shall have the right to freedom of speech and expression, and there shall be freedom of the press, subject to any reasonable restrictions imposed by law in the interest of the glory of Islam or the integrity, security or defence of Pakistan or any part thereof, friendly relations with foreign States, public order, decency or morality, or in relation to contempt of court, [commission of] or incitement to an offence.

Most of the restrictions prescribed in Article 19 have been codified through a set of laws (see Figure 2).

Constitutional restrictions on right to freedom of expression and related laws

There are other laws that restrict expression and define criminalised forms of expression, like the Defamation Act 2004, that do not clearly fall within the prescribed restrictions structure. There has been debate over the subjective nature of some of the prescribed limitations. In particular the limitation on speech that is against “decency” and “morality” remains highly subjective and open to interpretation, as these terms have not been defined in any of the legal mechanisms.

In *Benazir Bhutto vs Federation of Pakistan* (1988), Chief Justice Muhammad Haleem states:

The difficulty of determining what would offend against morality is enhanced by the fact that not only does the concept of immorality differ between man and man, but the collective notion of society also differs amazingly in different ages. All that can be said is that the antonym of the word “morality” according to the existing notion depends upon acts which are regarded as acts of immorality by the consensus of general opinion.¹¹

In *Yaqub Beg vs State*, Justice A. S. Faruqi states:

Obscenity as understood in law consists of publishing or exhibiting such matter or object which has the tendency to corrupt the minds of those who are open to immoral influences by exciting in them sensuality and carnal desire.¹²

Thus, even the case law within which the concepts of morality, etc. have been deconstructed sets a subjective parameter for their definition.

Here is a look at other restrictions and legal tools used for defining those restrictions, particularly in the online sphere.

Blasphemy

The offence of blasphemy is defined in different sections of the Pakistan Penal Code. From the banning of platforms like YouTube, to initiation of arrest warrants for Facebook founder Mark Zuckerberg, enforced disappearances of bloggers accused of blasphemy, vigilante murders for alleged blasphemous expression online, awarding a death sentence to an accused, or a court order recommending

building a firewall to block Facebook completely in case of failure to rid it of all blasphemous content: this particular area of restriction has the most well-developed body of case law focused on the online space.

The offence is codified in the following three sections from the Pakistan Penal Code, 1890:

295 A – Deliberate and malicious acts intended to outrage religious feelings of any class by insulting its religion or religious beliefs. Whoever, with deliberate and malicious intention of outraging the religious feelings of any class of [citizens of Pakistan], by words, either spoken or written, or by visible representations, insults or attempts to insult the religion or the religious beliefs of that class, shall be punished with imprisonment of either description for a term which may extend to [ten years], or with fine, or with both.

295 C – Use of derogatory remarks, etc., in respect of the Holy Prophet. Whoever by words, either spoken or written, or by visible representation, or by any imputation, innuendo, or insinuation, directly or indirectly, defiles the sacred name of the Holy Prophet Muhammad (peace be upon him) shall be punished with death, or imprisonment for life, and shall also be liable to fine.

298 A – Use of derogatory remarks, etc., in respect of holy personages. Whoever by words, either spoken or written, or by visible representation, or by any imputation, innuendo or insinuation, directly or indirectly, defiles the sacred name of any wife (Ummul Mumineen), or members of the family (Ahlebait), of the Holy Prophet (peace be upon him), or any of the righteous Caliphs (Khulafa e Raashideen) or companions (Sahaaba) of the Holy Prophet (peace be upon him) shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both.

Different court orders strictly affirm the restriction; in *Zaheeruddin vs State* (1993), Justice Abdul Qadeer Chaudhry states that “anything, in any fundamental right, which violates the Injunctions of Islam thus must be repugnant.” In *Masroor Ahsan vs Aredeshir Cowasjee* (1998), Justice Munawar Ahmad Mirza states that “a citizen has to be mindful about paramount religious, cultural or social textures and basic features by avoiding [...] provoking towards contravention of existing laws or prejudicing glory of Islam in the

¹¹ Reported Caselaw Trends on the Freedom of Speech and Expression in the Islamic Republic of Pakistan (2015).

¹² Reported Caselaw Trends on the Freedom of Speech and Expression in the Islamic Republic of Pakistan (2015).

garb of freedom or liberty whether for speech or press.”

In addition to Section 295 A and B of the PPC, Section 37 of the Prevention of Electronic Crimes Act, 2016 also instructs the Pakistan Telecommunication Authority (PTA) to block access to content that is “against the glory of Islam” – i.e. blasphemous content.

Some of the more prominent cases of blasphemy involving technology include a first information report (FIR) filed against Shan Taseer, son of a former governor who was killed by his own guard for criticising the blasphemy law.¹³ The FIR against Shan Taseer is also on criticism of the law, not conducting blasphemy itself. The criticism was expressed through social media. In 2017, Pakistan also witnessed the first sentence of capital punishment¹⁴ for someone convicted of expressing blasphemy online. On 17 September 2017, another death sentence was given to a Christian man for sending a blasphemous poem over WhatsApp.¹⁵ Cases filed have included incidents of sending SMS,¹⁶ sending text over WhatsApp,¹⁷ recording and sending blasphemous content via mobile phone,¹⁸ or “liking” blasphemous posts on Facebook¹⁹ or other social media.²⁰ Cases have also been registered against non-Pakistani citizens and residents.²¹

Another serious development was the decision of Salman Shahid vs Federation of Pakistan. Justice Shaukat Aziz Siddiqui of the Islamabad High Court commented in the decision²² that the government should try to initiate action to permanently shut down websites and pages that host blasphemous content. The court also asked the government to “agitate the matter before the United Nations through its permanent delegate for legislation at international level against such acts and convey the reservations of the Muslims of the world in general and that of Pakistan in particular regarding the publication of such objectionable material.” The justice has also recommended more stringent legislation on the likes of other “Islamic countries” as well as China.

Restrictions on the basis of national security

The most prominent law that defines restrictions geared towards protection of national security is the Anti Terrorism Act. Section 11W of the Anti Terrorism Act has been used to register cases against speech online:

11W. Printing, publishing, or disseminating any material to incite hatred or giving projection to any person convicted for a terrorist act or any proscribed organization or an organization placed under observation or anyone concerned in terrorism.

(1) A person commits an offence if he prints, publishes or disseminates any material, whether by audio or videocassettes [or any form of data storage device, FM radio station or by any visible sign] or by written photographic, electronic, digital, wall chalking or any other method [or means of communication] which [glorifies terrorists or terrorist activities or] incites religious, sectarian or ethnic hatred or gives projection to any person convicted for a terrorist act, or any person or organization concerned in terrorism or proscribed organization or an organization placed under observation:

Provided that a factual news report made in good faith shall not be construed to mean “projection” for the purposes of this section.

(2) Any person guilty of an offence under subsection shall be punishable on conviction with imprisonment, which may extend to five years and with fine.

In June 2017, a man was handed the death sentence for committing blasphemy over Facebook. The

13 Tanvir, R. (2016, 31 December). Shaan Taseer booked for “hate speech” following Christmas message. *The Express Tribune*. <https://tribune.com.pk/story/1280484/shaan-taseer-booked-hate-speech-following-christmas-message>

14 Rasmussen, S., & Gillani, W. (2017, 11 June). Pakistan: man sentenced to death for blasphemy on Facebook. *The Guardian*. <https://www.theguardian.com/world/2017/jun/11/pakistan-man-sentenced-to-death-for-blasphemy-on-facebook>

15 Johnston, I. (2017, 16 September). Christian man sentenced to death in Pakistan over ‘blasphemous’ WhatsApp message sent to friend. *The Independent*. www.independent.co.uk/news/world/asia/pakistan-blasphemy-death-sentence-nadeem-james-poem-whatsapp-message-gujrat-a7950561.html

16 Islam, S. (2012, 3 March). Blasphemy prosecution: Cleric made complainant on court directive. *The Express Tribune*. tribune.com.pk/story/344660/blasphemy-prosecution-cleric-made-complainant-on-court-directive

17 AFP. (2016, 11 July). Christian man in Lahore charged with blasphemy over WhatsApp poem. *The Express Tribune*. tribune.com.pk/story/1139513/christian-man-lahore-charged-blasphemy-whatsapp-poem

18 Gabol, I. (2016, 28 June). Two Christians among three sentenced to death for blasphemy by Punjab court. *Dawn.com*. <https://www.dawn.com/news/1267876/two-christians-among-three-sentenced-to-death-for-blasphemy-by-punjab-court>

19 Jami, A. (2017, 24 March). FIA arrests three in social media blasphemy case. *Dawn.com*. <https://www.dawn.com/news/1322531>

20 Dhakku, N. (2014, 15 November). Man held over blasphemy allegation. *Dawn.com*. <https://www.dawn.com/news/1144655/man-held-over-blasphemy-allegation>

21 Islam, S. (2012, 28 February). Blasphemy: Burning Quran is a form of international terrorism, says petitioner. *The Express Tribune*. tribune.com.pk/story/342763/blasphemy-burning-quran-is-a-form-of-international-terrorism-says-petitioner

22 Salman Shahid vs Federation of Pakistan via Ministry of Interior, Writ Petition739/2017 (Islamabad High Court 2017).

sentence was handed over by the Anti Terrorism Court and Section 11W was one of the sections used to bring about the charge. In this particular case, Section 11W was evoked as the speech could “whip up sectarian hatred”.²³ Section 11W has also been used in a case of blackmail over Facebook.²⁴

Within Pakistan’s security context, Section 11W is seen as a key instrument to curb speech that can threaten national security in any manner. A demonstrative case regarding application of 11W is High Court Bar Association vs Government of Balochistan.²⁵ The case was initiated through the Registrar of Balochistan High Court who drew notice to the reporting of a terrorist incident in which 26 persons were brutally murdered and a banned organisation Lashkar e Jhangvi (LeJ) claimed responsibility. The notice included reports mentioning LeJ from 10 newspapers. The judgment notes the fact that the court had received statements from media representatives regarding the threats they receive unless they air the claims of organisations like LeJ. However, the judgment holds that despite the threats and the fear of life, the compliance with 11W was mandatory. Upon reception of threats the media was directed to “report to the police” but if the electronic media and press “propagate the view of banned organizations they are not acting as good and responsible journalists but as mouthpieces for malicious and vile propaganda.” In this context the government was instructed to initiate action under Section 11W against any publications/broadcasts that included claims from banned/terrorist organisations.

It is important to note that journalists in Balochistan are directly under threat from banned organisations and other actors. In the last 17 years more than 22 journalists have been killed in the region²⁶ and in 2012, the year before the judgment was issued, the wave of violence against journalists had extended to targeting their family members.²⁷ This case does not relate to online expression and has been cited only to demonstrate the approach

that is taken by the court when the law’s application is concerned.

In the new cybercrime legislation, the Prevention of Electronic Crimes Act (PECA) 2016, section 12 criminalises preparation or dissemination of “information, through any information system or device that invites or motivates to fund, or recruits people for terrorism or plans for terrorism.”

Another Section in PECA criminalises “glorification of an offence”:

Section 9. – Glorification of an offence. (1) Whoever prepares or disseminates information, through any information system or device, with the intent to glorify an offence relating to terrorism, or any person convicted of a crime relating to terrorism, or activities of proscribed organizations or individuals or groups shall be punished with imprisonment for a term which may extend to seven years or with fine which may extend to ten million rupees or with both.

So far there are no judgments in any cases that have been registered on the basis of Section 9 or 12 of the law. PECA also empowers security and intelligence agencies to initiate action, including real-time surveillance for “national security” reasons.²⁸

Contempt of court

The Contempt of Court Act, 2012, defines the offence of contempt of court:

Whoever disobeys or disregards any order, direction or process of a court, which he is legally bound to obey or commits a willful breach of a valid undertaking given to a court or does anything which is intended to or tends to bring the authority of a court or the administration of law into disrespect or disrepute, or to interfere with or obstruct or interrupt the process of law or the due course of any judicial proceedings, or to lower the authority of a court or scandalize a judge in relation to his office, or to disturb the order or decorum of a court, is said to commit “contempt of court”.

There is no documented case of the Act itself being used to initiate legal action against expression online. However, one prominent case of a political worker being arrested for “tweeting against the judiciary” has been documented. A political worker from Pakistan, Tehreek Insaaf, was arrested by

23 Gabol, I. (2017, 10 June). First death sentence handed to man for blasphemy on social media. *Dawn.com*. <https://www.dawn.com/news/1338684>

24 Hussnain, F. (2017, 2 August). Facebook blackmailer sentenced to 14 months in prison. *The Nation*. nation.com.pk/laure/02-Aug-2017/facebook-blackmailer-sentenced-to-14-months-in-prison

25 PLD 2013 Balochistan 75.

26 Baig, A. (2015, 3 June). Safe Nowhere – Plight of Journalists in Pakistan – Part 3: Case List of Journalists Killed in the Line of Duty. *Media Matters for Pakistan*. mediamatterspakistan.org/844

27 The Express Tribune. (2012, 26 October). Second son of Khuzdar Press Club president passes away. *The Express Tribune*. <https://tribune.com.pk/story/457243/second-son-of-president-khuzdar-press-club-passes-away>

28 Gishkhori, Z. (2016, 20 October). ISI to take action against cyber crimes breaching national security. *Geo.tv*. <https://www.geo.tv/latest/118292-Govt-accepts-ISIs-role-in-taking-action-against-cyber-crimes>

the Federal Investigation Agency (FIA) for tweeting against the judiciary following a tweet in which he had shared a wedding invitation card to demonstrate conflict of interest²⁹ in a judgment.

While the framing of the charge dealt with tweeting against the judiciary, the law used to initiate the charge was not the Contempt of Court Act, but the Electronic Transactions Ordinance (ETO).³⁰ Article 36 of the ETO, which was used to initiate the action states:

Any person who gains or attempts to gain access to any information system with or without intent to acquire the information contained therein or to gain knowledge of such information, whether or not he is aware of the nature or contents of such information, when he is not authorised to gain access, as aforesaid, shall be guilty of an offence under this Ordinance punishable with either description of a term not exceeding seven years, or fine which may extend to one million rupees, or with both.

For what actually constitutes contempt with regard to speech, Justice Shabir Ahmed in the *State vs Abdur Rehman*³¹ held:

It is not everything said or written against a Judge that amounts to contempt of court and it is only such utterances or writings which are calculated to bring a Court or a Judge of Court into contempt or to lower his authority or such utterances or writings which are calculated to construct or interfere with the due course of justice or the lawful process that amount to it.

Sedition

Sedition has been defined in Section 124-A of the Pakistan Penal Code:

124-A – Sedition. Whoever by words, either spoken or written, or by signs, or by visible representation, or otherwise, brings or attempts to bring into hatred or contempt, or excites or attempts to excite disaffection towards, the Federal or Provincial Government established by law shall be punished with imprisonment for life, to which fine may be added, or with imprisonment which may extend to three years, to which fine may be added, or with fine.

29 The judge who had granted bail to the accused in a corruption case was the mother-in-law of the accused.

30 Akbar, A. (2015, 28 October). FIA arrests PTI activist for “tweeting against judiciary”. *Dawn.com*. <https://www.dawn.com/news/1215966>

31 1957 PLD (W. p.) Baghdad-ul-Jadid 6.

An interesting case evoking charges of sedition is *Ali Raza vs Federation of Pakistan*³² brought before Justice Mohsin Akhtar Kyani. The case was registered for the putting up of posters in the Federal Capital that seemingly called for the imposition of martial law. The posters displayed a glamorous picture of then Army Chief Gen. Raheel Sharif, along with the caption: “Education, health, peace, move on Pakistan.” The initial case was brought forward after a police officer filed an FIR on grounds of sedition and conspiracy against the state, stating that the posters appear to call for one institution to take charge of other democratic institutions. In this case, the court held that “private persons cannot agitate the matter regarding sedition charges, rather it should be initiated, inquired and investigated by the Government or at least on their instruction.” The court also held that there must be a clear call for rebellion or promotion of feeling of enmity, hatred or ill will between different religious groups, or racial or linguistic or regional groups or castes. The judgment also holds that in matters of sedition, the court “has to consider the speech in a free, fair and liberal spirit and not in a narrow minded or sectarian way.”

The judgment also quotes a previous judgment of Sindh High Court, 2010 YLR 1647 Ft. Lt. (Dr) Shariq Saeed vs Mansoob Ali Khan and five others:

The right of free speech extends to all subjects which affect ways of life without limitation of any particular fact human interest and include in the main term “freedom of expression”. Moreover the right to freedom of speech and expression carries with it the right to publish and circulate one’s ideas through any available means of publication.

The inclusion of the reference to the right being applied to “any means of publication” is important in this regard as the offending posters on which the writ petition was initiated were also circulated widely through social media.

There are no prominent cases in which sedition charges have been applied to speech/expression that was exclusively online. However, if one sees seditious speech as largely being anti-state speech, there are examples in which such material has been blocked. A look at a Facebook transparency report demonstrates that the state regularly gets “anti-state” content that is critical of the state³³ removed from the social media platform. Some of the content has been removed for condemnation

32 2017 PLD 64 Islamabad.

33 <https://govtrequests.facebook.com/country/Pakistan/2013-H2>

of the country's independence.³⁴ According to media reports the FIA holds that “anti-state and hate propaganda” is the second-most misused subject on social media. The FIA also claims to have received “7,500 complaints from the public as well as state institutions of as many as 64,000 Twitter accounts and Facebook pages being involved in blasphemy and supporting anti-state, criminal and terrorist activities.” The same report states that three social media users were arrested in Lahore, Islamabad and Quetta for alleged involvement in anti-state activities.³⁵ The sedition law has not been used in any of these cases; however, if sedition is largely seen as speech that is “anti-state”, then there are various instances in which such speech has been blocked and criminalised.

Additionally, legislators including cabinet members have criticised the speech by bloggers at Bhensa, Mochi and Roshni as being anti-state. However, even in these cases, the state did not get involved in litigation and the bloggers allegedly involved in running these pages were abducted and later returned without any explanation from the government itself. This demonstrates that even in the cases where there was some public narration about possible anti-state activities online, the course selected to tackle such speech was extrajudicial.

Pornography

There is a general social consensus in Pakistan about blocking access to pornographic material. Pornographic content is generally seen as falling within the “decency and morality” related restrictions. The internet regulator, PTA, has been engaged in launching massive drives to block pornographic content, once landing in a controversy when allegedly a 15-year-old was engaged to make a list of pornographic websites to be blocked within the country. The teenager Ghazi Muhammad Abdullah found almost 780,000 adult pages in six months, calling this task his “religious and national”³⁶ duty. After driving criticism PTA issued a tender for creation of a system for filtering content. As per media reports, over 500,000 websites with pornographic content are currently blocked in the country. A media report also indicated that in the guise of blocking pornographic content, other content was

also being blocked. The investigation by Dawn.com found that “the list of 429,343 websites, obtained by Dawn.com from an ISP source close to the ongoing process, has been found to be flawed as scores of sites with no pornographic content are included in the list.”³⁷

The same list was also used to block Tumblr from Pakistan.

Within the law, the focus is on criminalisation of child pornography. Both the PPC and PECA include sections that criminalise and define penalties for those engaged in production, possession or distribution of content that depicts children/minors in sexually explicit conduct. The relevant sections of the law include:

Section 292 B, Pakistan Penal Code, 1860 – Child pornography. (1) Whoever takes, permits to be taken, with or without the consent of the child or with or without the consent of his parents or guardian, any photograph, film, video, picture or representation, portrait, or computer generated image or picture, whether made or produced by electronic, mechanical, or other means, of obscene or sexually explicit conduct, where. — (a) the production of such visual depiction involves the use of a minor boy or girl engaging in obscene or sexually explicit conduct; (b) such visual depiction is a digital image, computer image, or computer generated image that is, or is indistinguishable from, that of a minor engaging in obscene or sexually explicit conduct; or (c) such visual depiction has been created, adapted, or modified to appear that an identifiable minor is engaging in obscene or sexually explicit conduct; is said to have committed an offence of child pornography.

(2) The preparation, possession or distribution of any data stored on a computer disk or any other modern gadget, shall also be an offence under this section.

Section 22, PECA 2016 – Child pornography. (1) Whoever intentionally produces, offers or makes available, distributes or transmits through an information system or procures for himself or for another person or without lawful justification possesses material in an information system, that visually depicts—

- (a) a minor engaged in sexually explicit conduct;
- (b) a person appearing to be a minor engaged in sexually explicit conduct; or

34 <https://govtrequests.facebook.com/country/Pakistan/2016-H2>

35 Haq, R. (2017, 20 August). Cyber crime: 64,000 social media users reported to FIA. *The Express Tribune*. <https://tribune.com.pk/story/1486291/cybercrime-64000-social-media-users-reported-fia>

36 Crilly, R. (2012, 14 March). Pakistan uses teenage boy to help with pornography crack down. *The Telegraph*. www.telegraph.co.uk/news/worldnews/asia/pakistan/9143296/Pakistan-uses-teenage-boy-to-help-with-pornography-crack-down.html

37 Haque, J. (2016, 25 May). Pakistan's impossible attempt to block 400,000 porn sites continues. *Dawn.com*. https://epaper.dawn.com/DetailImage.php?StoryImage=25_05_2016_001_007

- (c) realistic images representing a minor engaged in sexually explicit conduct; or
- (d) discloses the identity of the minor, shall be punished with imprisonment for a term which may extend to seven years, or with fine which may extend to five million rupees or with both.

Defamation

The offence of defamation has been defined in the Pakistan Penal Code and within the Defamation Act, 2004. The relevant sections are as follows.

Section 499, Pakistan Penal Code, 1860 – Defamation. Whoever by words either spoken or intended to be read, or by signs or by visible representations, makes or publishes any imputation concerning any person intending to harm, or knowing or having reason to believe that such imputation will harm the reputation of such person, is said, except in the cases hereinafter excepted, to defame that person.

Defamation Act 2004

2(b) “broadcasting” means the dissemination of writing, signs, signals, pictures and sounds of all kind, including any electronic device, intended to be received by the public either directly or through the medium of relay stations, by means of,

- (i) a form of wireless radioelectric communication utilizing Hertzian waves, including radiotelegraph and radiotelephone; or
- (ii) cables, computer, wires, fibreoptic linkages or laser beams, and “broadcast” has a corresponding meaning;
- (e) “publication” means the communication of the words to at least one person other than the person defamed and includes a newspaper or broadcast through the internet or other media; and

(2) Defamation is of two forms, namely: (i) slander; and

(ii) libel.

(3) Any false oral statement or representation that amounts to defamation shall be actionable as slander.

(4) Any false written, documentary or visual statement or representation made either by ordinary form or expression or by electronic or other modern means or devices that amounts to defamation shall be actionable as libel.

8. Notice of action. No action lies unless the plaintiff has, within two months after the publication of the defamatory matter has come to his notice or knowledge, given to the defendant

fourteen days notice in writing of his intention to bring an action, specifying the defamatory matter complained of.

Case law on defamation demonstrates that accusations of defamation often result in acquittals or dismissal of cases without penalties. Both technical and other grounds are used for dismissal of cases. Case law on defamation also sets a high standard for accusation of defamation to be proved. In *Mst. Shash Begum vs Bashir Ullah*, Justice Seikh Ahmed Farooq (2013 PCrLJ 1737 Federal Shairait Court) holds that “the most essential ingredient for constituting an offence of defamation is mens rea or intention (Reliance PLD 2001 - Jarachi - 115).” The judgment also holds that any “accusation preferred in good faith against any person to any of those, who have lawful authority over that person or an imputation made in good faith by person for protection of his right or interest, as do not fall within the definition of Defamation as envisaged under section 499 PPP.”

The Defamation Act and case law both have a strong tradition of defence. The judgment in *Syed Mehmood Ali vs Network Television Marketing (pvt) limited and other defendants (2005 C LD 840)* in connection with the interpretation of the law holds that “a class or particular section group of people cannot claim to be defamed as a class, section, group or community nor an individual can claim to be defamed by general reference to the class, section group or community to which he belonged.” The judgment also holds that a “person accused of libel may defend the action on the plea of fair comment on a matter of public good or interest, absolute or qualified privilege or if it shown to be with the permission or consent of the injured and aggrieved person.”

There are no prominent cases in which defamation suits have been initiated purely on the basis of speech/expression online.

However, the Prevention of Electronic Crimes Act, 2016 has also introduced certain provisions through which defamation charges might be brought forward. In particular, section 20 of PECA 2016, “Offences against dignity of a natural person”, holds:

Whoever intentionally and publicly exhibits or displays or transmits any information through any information system, which he knows to be false, and intimidates or harms the reputation or privacy of a natural person, shall be punished with imprisonment for a term which may extend to three years or with fine which may extend to one million rupees or with both.

This section does not apply to content aired by broadcast media or distribution service licensed under the Pakistan Electronic Media Regulatory Authority Ordinance, 2002 (XIII of 2002).

Unlike Section 499 of the PPC and the Defamation Act 2004, both of which include a strong set of defences, section 20 of PECA 2016 does not offer any kind of defence to the accused. The PPC and the Defamation Act also set a limitation of liability defining the time within which defamation charges can be brought. This limitation is also missing in PECA. The lack of any limitation and defined defences in the law create the possibility of abuse of the law. However, since the law is fairly new, and courts have only recently been notified,³⁸ the case law showing how this section is interpreted and applied is not developed as yet.

Hate speech

Regulation of hate speech online has been a challenge worldwide. In Pakistan, hate speech has been an issue of serious concern. There is a large presence of terrorist and sectarian organisations online, including Lashkar-e-Jhangvi who have traditionally called out for murder and violence against the minority Shia sect. Hate speech against the Ahmadiya community is also abundant and often includes calls for violence. In addition, accusations of blasphemy online, followed by calls for murder of the accused, are increasingly common and have a very real potential of translating into physical violence. On the other hand, defining hate speech is a challenge. Given the state's track record of crackdowns against political and ideological dissidents, the likelihood of hate speech laws being misused remains high.

Hate speech was traditionally tackled through Section 11W of the ATA. However, PECA 2016 has introduced a specific section criminalising hate speech online. The section states:

11. Hate speech – Whoever prepares or disseminates information, through any information system or device that advances or is likely to advance interfaith, sectarian or racial hatred, shall be punished with imprisonment for a term, which may extend to seven years or with fine or with both.

No case law has been developed so far to demonstrate the application and interpretation of this section. During the public consultations with civil society, the Ministry of IT held that this section was being included to make sure that terrorist outfits

and proscribed organisations³⁹ that openly engage in inciting sectarian violence by using hate speech online are brought under the ambit of the law. However, a year after the law was passed, in September 2017, an investigation by the country's oldest English-language newspaper Dawn⁴⁰ demonstrated the continued presence and operation of these organisations online. The investigation showed that these organisations “are present on Facebook in the form of hundreds of pages, groups and individual user profiles” and enjoy a collective following of 160,000 people. The investigation also found that the content of these pages largely includes “hate speech directed at religious minorities and other members of society.”

One of the outfits that are present and operating on Facebook is the Lashkar-e-Jhangvi (Lej), a militant organisation that has publicly accepted responsibility for killing members of the Shia community and that openly calls for violence against them. The outfit has been engaged in multiple high-profile incidents of terrorism including the killing of US journalist Daniel Pearl, the killing of Iranian diplomats and an attack on a Sri Lankan cricket team in Lahore, Pakistan. Dawn's investigation found that the group is operating eight pages and groups on Facebook.⁴¹ These pages and groups obviously promote the hate-filled ideology of Lashkar-e-Jhangvi and yet there are no cases registered that evoke the hate speech clause against Lej. In addition to Facebook, the same organisation and its supporters continue to openly distribute *fatwas* or religious decrees against the Shia sect, calling the murder of Shias *jihad* or a part of the Holy War.⁴² The fatwa referred to here calls Shia Muslims “infidels” and says they are “liable to be murdered.” It also pledges to rid the country of this *napaak* or unclean community by continuing to engage in their murder. The group continues to circulate such decrees online. These obviously come under the definition of hate speech as defined in PECA. However, so far we have not really seen its implementation and not a single case has been brought forth under the section.

This lends support to the fear that the sections that criminalise different forms of speech included in PECA are more actively used to clamp

39 nacta.gov.pk/proscribed-organizations

40 Haque, J., & Bashir, U. (2017, 14 September). Banned outfits in Pakistan operate openly on Facebook. *Dawn.com*. <https://www.dawn.com/news/1335561>

41 *Ibid.*

42 Jafria News. (2013, 10 April). Lashkar e Jhangvi Pamphlet Against Shia Community. *Jafria News*. <https://jafrianeews.com/2013/04/10/wahabi-clerics-issuing-fatwas-of-sexual-jihad-for-fsa-terrorist-allowing-them-raping-non-sunni-women-in-syria/lashkar-e-jhangvi-pamphlet-against-shia-community>

38 moit.gov.pk/policies/designatedcourts.pdf

down against political dissidents rather than being evoked against those who are directly engaged in terrorist and militant activities.

Other restricting mechanisms

PECA includes another set of provisions that do not fall directly under the categories defined above. The most prominent of these is Section 21:

Offences against modesty of a natural person and minor. Whoever intentionally and publicly exhibits or displays or transmits any information which,—

(a) superimposes a photograph of the face of a natural person over any sexually explicit image or video; or

(b) includes a photograph or a video of a natural person in sexually explicit conduct; or

(c) intimidates a natural person with any sexual act, or any sexually explicit image or video of a natural person; or

(d) cultivates, entices or induces a natural person to engage in a sexually explicit act, through an information system to harm a natural person or his reputation, or to take revenge, or to create hatred or to blackmail, shall be punished with imprisonment for a term which may extend to five years or with fine which may extend to five million rupees or with both.

At first glance, the section appears clear in its intention: most cases initiated under this clause, including one currently being heard in the special court in Karachi, have been brought by women being blackmailed and intimidated by the use of morphed pictures. However, since May 2016, the FFIA, the key investigative body defined in PECA, has been engaged in a crackdown against journalists, bloggers and micro-bloggers who have been accused of penning *anti-Army* content.⁴³ In a number of cases, including one involving a journalist, Zafar Achakzai,⁴⁴ the FIA has used Section 21 of PECA. The journalist was arrested in Quetta and later granted bail.⁴⁵ How exactly a piece or tweet that is critical of the Army falls under the ambit of this

section is something that is yet to be explored as there are no decisions in any of these cases yet.

What is alarming is the abuse and even disregard of the procedures described within the law. FIA officials have not only brought in people without registration of formal charges, they have also allegedly gone through their data and devices. A news story in *The Guardian* quotes an FIA official saying that “his agency had orders from the interior ministry to interrogate, and seize laptops and phones, without warrant.”⁴⁶ The story also claims that the agent was authorised to detain anyone on suspicion. Following a similar attempt by the FIA to intimidate another journalist into submission, Taha Siddiqui, the affected journalist, initiated a petition against the agency in the Islamabad High Court. The journalist, who is known to be critical of the security institutions, was initially contacted by the Counter Terrorism Department of the agency. During the course of the court hearing, his case was transferred to the Cyber Crime Wing⁴⁷ and he was later asked to visit the FIA so that “log in and technical staff may scrutinise his account.” This is against the procedure defined within the law, which requires the agency to acquire a warrant before any such logging or scrutinisation can take place. Since PECA 2016 has been enacted, there have been various cases of concern where bloggers have faced enforced disappearances, journalists have been picked up and tortured while being interrogated about their social media activity,⁴⁸ and political workers have been harassed to leave digital spaces.

Another restricting mechanism is PECA Section 37, which does not criminalise content *per se*, but defines very broad categories of “unlawful content” that is supposed to be proactively blocked by the PTA. Section 37 states:

The Authority (PTA) shall have the power to remove or block or issue directions for removal or blocking of access to an information through any information system if it considers it necessary in the interest of the glory of Islam or the integrity, security or defence of Pakistan or any part thereof, public order, decency or morality, or in relation to contempt of court or commission of or incitement to an offence under this Act.

43 The Nation. (2017, 16 May). FIA traces 12 websites with anti-Army content. *The Nation*. nation.com.pk/national/16-May-2017/fia-traces-12-websites-with-anti-army-content

44 Hashim, A. (2017, 30 June). Pakistan: Zafar Achakzai charged for anti-army post. *Al Jazeera*. www.aljazeera.com/news/2017/06/pakistan-zafar-achakzai-charged-anti-army-post-170630074828317.html

45 Shah, S. (2017, 5 July). Quetta court grants bail to journalist arrested by FIA over “anti-state” social media posts. *Dawn.com*. <https://www.dawn.com/news/1343411/quetta-court-grants-bail-to-journalist-arrested-by-fia-over-anti-state-social-media-posts>

46 Rasmussen, S., & Gillani, W. (2017, 11 June). Op. cit.

47 The Express Tribune. (2017, 6 July). Journalist Harassed: Case transferred to cyber crime wing. *The Express Tribune*. <https://tribune.com.pk/story/1451057/journalist-harassed-case-transferred-cyber-crime-wing>

48 Dawn. (2017, 11 July). Journalist freed after “torture”. *Dawn.com*. <https://www.dawn.com/news/1344495>

This section borrows language directly from Article 19 of the constitution, effectively giving the PTA, an executive authority operating under the federal government, the power to interpret the constitution. Interpretation of constitutional provisions has traditionally been done only through the higher judiciary. Article 19, as discussed in the previous sections, clearly says that the restrictions have to be defined by law; however, through this provision, the interpretation of already subjective limitations like integrity of Islam, decency and morality, etc. has been transferred to a body that has traditionally been tasked only with the licensing of the telecommunication sector and reports to the government. Since the enactment of PECA, the PTA has established a research cell of 25 persons⁴⁹ who scour the internet for objectionable material to be removed or blocked.

The law instructs the PTA to “prescribe rules providing for, among other matters, safeguards, transparent process and effective oversight mechanism for exercise of powers under subsection” and until that time, to “exercise its powers under this Act or any other law for the time being in force in accordance with the directions issued by the Federal Government.” For the sake of transparency and accountability, the PTA was instructed to file a report about the implementation of this section in the parliament. However, despite a formal request from a legislator, Senator Farhatullah Babar,⁵⁰ the PTA has yet to submit this report. The law also defines a redressal mechanism in cases where internet users might feel aggrieved by the censorship orders. The aggrieved person/s must “file an application with the Authority for review of the order within thirty days from the date of passing of the order” and “an appeal against the decision of the Authority in review shall lie before the High Court within thirty days of the order of the Authority.”

However, there is a challenge with this redressal mechanism as well: the PTA has historically been secretive of the list of websites/pages/users it chooses to block. The local organisation Media Matters for Democracy (MMFD) has filed multiple requests under the Right to Information Act requesting a complete list of banned websites along with the reasons for blockage, and received no response from the Authority. This situation is likely

to continue. Thus, the redressal mechanism would technically enable only the creators of the content to initiate proceedings, because without an updated list of blocked material, general consumers of information, i.e. internet users, might not even be aware that it has been blocked.

Media reports also demonstrate that in addition to the PTA, other state departments have also been activated to keep an eye out on the internet. In July 2017, the Punjab Safe Cities Authority (PSCA) reported “684 objectionable pages and IDs of both Facebook and Twitter during its strike against anti-state, anti-social, blasphemous and sectarian warmongering elements on social media.”⁵¹ In June 2017, the counter-terrorism department in Sindh had also identified and sought action against “25 such websites, which were involved in spreading religious and ethnic extremism and terrorism.”⁵²

Finally, an old colonial law that can potentially be used to restrict speech online is the Telegraph Act 1885. This Act includes a section that can be used to criminalise “fabricated or obscene messages” sent online. Section 29 of the Telegraph Act states:

If any person transmits or causes to be transmitted by telegraph a message which he knows or has reason to believe to be false or fabricated, or a message which is indecent or obscene, he shall be punished with imprisonment for a term which may extend to three years, or with fine, or with both.

Potential for further violations

There are no draft laws currently available that have the potential for a direct impact on the practice of freedom of expression online. However, the potential for an increase in the abuse of existing laws is demonstrated through the political statements that have been given by cabinet members. The framing of social media tools like Twitter as a “threat to democracy” and the FIA’s crackdown against people tweeting against the Army without obtaining proper warrants or following the prescribed legal procedure appear to be a grim indication of things to come. Legislators from opposition parties have also publicly expressed doubts about the intentions underlying the cybercrime legislation. Senator Farhatullah Babar from the opposition Pakistan

49 Yousufzai, A. (2017, 9 May). PTA Monitored and Blocked 1660 Blasphemous Links/Sites. *Propakistani*. <https://propakistani.pk/2017/05/09/pta-monitored-blocked-1660-blasphemous-linkssites>

50 Ahmad, Z. (2017, 20 July). Senators call for cyber crimes legislation under Article 19. *Business Recorder*. fb.brecorder.com/2017/07/20170720199842

51 The News. (2017, 7 July). 684 social media IDs objectionable. *The News*. <https://www.thenews.com.pk/print/214986-684-social-media-IDs-objectionable>

52 Ali, I. (2017, 22 June). CTD seeks ban on 25 websites spreading “terrorism, extremism”. *Dawn.com*. <https://www.dawn.com/news/1341033>

People's Party termed the law "an attempt to curb citizens' freedom of speech rather than protect them."⁵³

The government's efforts to coerce corporations into providing user data also continue. In July 2017, Facebook refused a request by Pakistani authorities to link all user accounts with mobile numbers. Concerning this request, the PTA said that "mobile numbers are verified through biometric verification system in the country. The issue of fake accounts could be overcome if all existing accounts are verified with phone numbers." Given the history of political victimisation, the mere idea of linking users' Facebook activity with their identity and biometric data poses serious concerns.

There is a draft of a potentially enabling law: a new right-to-information legislation at the federal level. The law, if enacted in the form that is being advocated by civil society, will enable access to government and state documents through digital formats. Since information is directly connected to expression, the enactment of a strong right-to-information law at the federal level may widen the space for online expression as well. Another possibility of positive intervention in this regard is the fact that Pakistan has signed on to the Open Government Partnership (OGP). As a part of the national action plan that is being created to move towards the goals of openness and transparency, the Ministry of IT has signed on to a commitment to table a consultative draft of data protection legislation in the parliament. The draft IT policy also includes a commitment to introduce data protection legislation for the "protection of personal data and online privacy for improved transparency and security of sensitive and confidential information." Data protection legislation, again, can have an enabling impact on online expression.

Finally, the implementation process of PECA gives rise to various concerns about the sincerity of the government. It has been more than a year since the law was passed and notified and yet there are questions about how exactly it is being implemented. Media reports point towards the creation of cells within the PTA and FIA to monitor and censor online content, but there is no transparency about the composition of these cells or the process followed to enact them. Multiple right-to-information requests to the PTA have gone unanswered. A set of interviews conducted by MMFD⁵⁴ also showed a

discrepancy in the perspectives being given by the Ministry of IT, which prepared and tabled the law, and the FIA, the key investigating agency implementing the law. For instance, when asked about the role of intelligence agencies in real-time surveillance, an invasive and extreme tactic allowed under the cybercrime bill that can have a direct impact on the environment for online expression, the representative from the Ministry continued to hold that the intelligence agencies have no role and the FIA would be leading the implementation. However, interviewees from the FIA itself minimised their own role in this operation and held that the intelligence agencies are largely taking the lead in surveillance-related aspects of the law. Previously, media reports also claimed that "Rules being formed under the newly-passed legislation called the Prevention of Electronic Crime Act (PECA), 2016 will empower many agencies to crack down on individuals misusing the internet, social media, in particular."⁵⁵

These contradictions and the lack of transparency have not gone unnoticed. On 8 August 2017, the Sindh High Court, during the hearing of a constitutional petition against a crackdown on bloggers, "directed the interior ministry and the Federal Investigation Agency (FIA) to file a detailed report on cybercrime laws."⁵⁶ In July 2017, Senator Farhatullah Babar, a member of the Senate's standing committee on human rights, raised the issue on the floor of the Senate and inquired about a report⁵⁷ on the implementation of the bill that was due to be submitted six months after the law was enacted. Six months after this question was raised, the Federal Minister of Interior finally responded, giving his assurance that the said report would be filed within the week. However, at the time of writing, no report had been filed by the Ministry. This continued secrecy over the procedures and processes through which this law is being implemented remains a threat to the practice of freedom of expression online.

Summary and conclusion

The cases discussed above demonstrate an increase in the government's tendency towards criminalisation of online expression. The cybercrime law, PECA 2016, is one of the key indicators of the government's approach towards online expression,

53 Guramani, N. (2017, 19 July). Senators term Prevention of Electronic Crimes Act, 2016 a "black law". *Dawn.com*. <https://www.dawn.com/news/1346310>

54 The interviews are yet to be published and will appear on MMFD's digital rights website: digitalrightsmonitor.pk

55 Gishkori, Z. (2016, 20 October). Op. cit.

56 Siddiqui, T. (2017, 8 August). SHC asks Interior Ministry, FIA to file report on cyber crime laws. *Dawn.com*. <https://www.dawn.com/news/1350224>

57 Ahmad, Z. (2017, 20 July). Op. cit.

particularly expression that has political and ideological messages.

There is largely a lack of distinction within the laws about expression online and offline – for instance, the national security and terrorism-related laws, which have been applied in multiple cases on online speech, do not include a chalked-out distinction between the medium used to express. However, while the traditional laws have been applied online, the cybercrime law does include criminal penalties for expression that is exclusively shared online – in some instances these penalties do not apply or differ from penalties defined for similar expression in the offline sphere.

In addition to the laws that criminalise expression, there are three major points of concern with regard to the way these laws are being implemented and framed for the general public.

First, there is a complete lack of transparency and clarity when it comes to application of online censorship clauses included within the cybercrime law, which also makes it difficult for general internet users to ascertain how the PTA and FIA are interpreting the provisions of PECA. PECA includes certain clauses that do not directly criminalise expression but define the general environment within which freedom of expression online is to be exercised – for example, real-time surveillance and data collection clauses. With regard to these sections, which can potentially be invasive and restrictive of the practice of freedom of expression, there is a contradiction between the Ministry of IT and the investigative agency FIA: while the Ministry continues to hold that the country's security and intelligence agencies have no role in the implementation of these sections, the civil investigative agency representatives openly admit that the role of agencies in real-time surveillance is much higher than their own. The section itself is framed in reference to another law – the Investigation for Fair Trial Act – that legitimises the role of intelligence agencies in real-time digital surveillance in addition to the designated FIA.

Second, there is a structured campaign on the part of the government to link online expression to blasphemy and anti-state activities. More alarming than the actual legislation perhaps is the narrative being built by different state institutions to justify an increase in the crackdown against activists and journalists who frequently turn to the online sphere. As demonstrated in this report, both civil and military authorities have increasingly referred to the “dangers” that “anti-national and anti-state” elements online pose to the country. This narrative, supported by strong propaganda tools, has

been internalised by a significant populace and it is common to see violent reactions towards freedom of expression advocates. Social media, whenever mentioned by cabinet members and government parliamentarians during their media talks and briefs, is referred to as a tool for creating instability, a means of spreading anti-Islam and anti-state messages. In the same vein, the people who are vocal online, particularly those who openly protest and demonstrate against crackdowns on online freedom of expression, are framed as anti-state elements who do not have religious and moral grounding.

Finally, the prevalence of “mob justice” by right-wing elements who feel offended and threatened by religiously provocative speech is increasing. The government has failed to offer protection and justice and remains complicit even in cases where it was proven that the violence done in the name of blasphemy was deliberately provoked by the authorities. The case of Mashal Khan's murder is reflective of this brewing trend. At this stage it is very clear that the administration of Mardan University was involved in provoking the violence against their own student,⁵⁸ some of the screenshots used by the members of the mob to call him a blasphemer were fake, and the murder and subsequent mutilation of his body itself is obviously a heinous crime. And yet, political parties within the government were not only reluctant to take action against this brutality, but some right-wing parties actively tried to rile up the public sentiment further by connecting murder investigations with possible amendments in the blasphemy law.⁵⁹ Before the murder, a structured campaign against the bloggers who faced enforced disappearances and the activists who demonstrated for their recovery showed very clearly that state functionaries and their cronies with the media are willing and able to use the “blasphemy card” to taint even political speech in the eyes of the general public, thus creating an environment where people fear mob justice and retreat from their online spaces – and when this happens, the most regressive ways of evoking the criminalisation laws are not even necessary.

58 Akbar, A. (2017, 17 April). Lynching suspect gives statement: “University administration asked me to testify against Mashal”. *Dawn.com*. <https://www.dawn.com/news/1327576>

59 The Nation. (2017, 1 May). “Will cut tongue of anyone wanting to change blasphemy law,” says Jamaat-e-Islami KP chief. *The Nation*. nation.com.pk/national/01-May-2017/will-cut-tongue-of-anyone-wanting-to-change-blasphemy-law-says-jamaat-e-islami-kp-chief

UNSHACKLING EXPRESSION: A study on laws criminalising expression online in Asia

Freedom of expression and opinion online is increasingly criminalised with the aid of penal and internet-specific legislation. With this report, we hope to bring to light the problematic trends in the use of laws against freedom of expression in online spaces in Asia.

In this special edition of GISWatch, APC brings together analysis on the criminalisation of online expression from six Asian states: Cambodia, India, Malaysia, Myanmar, Pakistan and Thailand.

The report also includes an overview of the methodology adapted for the purposes of the country research, as well as an identification of the international standards on online freedom of expression and the regional trends to be found across the six states that are part of the study. This is followed by the country reports, which expound on the state of online freedom of expression in their respective states.

With this report, we hope to expand this research to other states in Asia and to make available a resource that civil society, internet policy experts and lawyers can use to understand the legal framework domestically and to reference other jurisdictions.

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